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No. 91-1339

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

JAIME L. FERRA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the sentence imposed by the district court on remand is supported by the record.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7-21) remanding the case to the district court for resentencing is reported at 900 F.2d 1057. The opinion of the court of appeals (Pet. App. 1-6) affirming petitioner's sentence after remand is reported at 948 F.2d 352.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1991. The petition for a writ of certiorari was filed on February 13, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted on one count of dealing in firearms without a license, in violation of 18 U.S.C. 922(a)(1); one count of possessing firearms while under criminal information, in violation of 18 U.S.C. 922(n); and two counts of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to a total of 120 months' imprisonment, reflecting concurrent terms of 60 months' imprisonment on each firearms count and 120 months' imprisonment on each drug count. The court of appeals vacated the judgment and remanded for further evidentiary proceedings and resentencing. Pet. App. 7-21. On remand, the district court imposed the same sentence. The court of appeals affirmed. Pet. App. 1-6.

1. In April 1988, an undercover officer of the Milwaukee, Wisconsin, Police Department bought 21 grams of cocaine from petitioner in exchange for $50 and a purportedly stolen microwave oven. Later, officers executing a search warrant at petitioner's tavern seized 164 grams of cocaine, approximately $50,000 in cash, and various items of stolen property. A second search yielded an additional ten grams of cocaine. Pet. App. 3, 7-8; Gov't C.A. Br. 23-24.

The evidence at trial showed that petitioner ran a fencing operation that serviced a large number of burglars in Milwaukee. Petitioner would provide the burglars with cocaine in exchange for cash and stolen goods. Petitioner often directed the burglars with whom he regularly dealt to obtain specific merchandise. One burglar named Diaz testified that he had obtained cocaine from petitioner in exchange for

cash or stolen goods on 200 occasions over a 30-week period. Pet. App. 5, 13; Gov't C.A. Br. 28-29.

At the initial sentencing hearing, the district court determined petitioner's base offense level by considering only the cocaine involved in the offenses of conviction. Under that approach, petitioner's applicable Guidelines range was 41-51 months' imprisonment. The court departed upward from that range and sentenced petitioner to 120 months' imprisonment on the ground that petitioner's criminal history category of II significantly underrepresented the seriousness of his prior offenses and the likelihood that he would commit more offenses in the future. Pet. App. 13-14.

2. The court of appeals vacated petitioner's sentence and remanded for resentencing. Pet. App. 7-21.* It agreed that petitioner's criminal history category underrepresented "his history and dangerousness," stating that "[t]he purchase of stolen guns for cocaine is, if nothing else, sufficiently unusual * * * that a departure is authorized." *Id.* at 14-15. Nevertheless, it held that the district court had not adequately explained the extent of the departure. *Id.* at 15-20.

The court of appeals observed that "[t]he computation of [petitioner's] guideline range assumed that he sold only 5 1/2 ounces of cocaine, the amount charged in the indictment." The court of appeals suggested that on remand the district court should take into account not only the amount of cocaine charged in the indictment but also "all drugs that were handled as

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* The court of appeals also remanded for further proceedings on petitioner's pretrial motion to suppress the cocaine, guns, and cash seized from petitioner's tavern (Pet. App. 8-9), and on petitioner's motion at trial to exclude the testimony of a co-conspirator (*id.* at 9-11). Following remand, the court of appeals affirmed the trial court's rulings on those motions (*id.* at 1-2), and they are not at issue in this Court.

'part of the same course of conduct or common scheme or plan as the offense of conviction.' " Pet. App. 17-18 (quoting Sentencing Guidelines § 1B1.3(a)(2)). The court noted that, depending on the total amount of cocaine involved, "the district judge might be able to sentence [petitioner] to 120 months without 'departing' in any way other than a one-level increase in criminal history category." Pet. App. 18.

3. In accordance with the court of appeals' instructions, on remand the district court determined petitioner's base offense level by aggregating the total quantity of cocaine petitioner possessed and distributed as part of the "same course of conduct or common scheme or plan as the offense of conviction," Sentencing Guidelines § 1B1.3(a)(2). The court found that the total quantity of cocaine was "a minimum of 577.48 grams." Gov't C.A. Br. 24. That finding was based on the amounts seized by the police, the amounts that petitioner supplied to the undercover officer and to a burglar named Hobbs, and the amounts that another burglar, Diaz, had testified that he had obtained from petitioner. Pet. App. 3-4. The court considered 577.48 grams to be a "very, very conservative" estimate, because it did not reflect the fact that the cash and stolen merchandise found in petitioner's possession had probably been exchanged for cocaine. Gov't C.A. Br. 23-24.

Based on its finding that petitioner had sold more than 500 grams of cocaine, the district court determined that petitioner's base offense level was 26. Gov't C.A. Br. 21-22. The court increased the offense level to 28 based on petitioner's managerial role in the fencing operation, Pet. App. 3, and assigned petitioner a criminal history category of III. Gov't C.A. App. A5. The resulting Guidelines range was 97-121 months'

imprisonment. Sentencing Table. The court sentenced petitioner to a 120-month term. Pet. App. 3-4.

4. The court of appeals affirmed petitioner's sentence. Pet. App. 1-6. It upheld the district court's finding that "[petitioner's] course of conduct included the sale of more than 500 grams of cocaine." *Id.* at 3. It rejected petitioner's argument that the district court erred in relying on Diaz's testimony that he had purchased cocaine from petitioner on 200 occasions. "[W]hether Diaz was a big-time thief or a big-time liar," the court of appeals stated, "[was] for the district judge to decide." *Id.* at 4. The court observed that, even if Diaz's testimony were discounted, the district court could have found that petitioner had sold more than 500 grams of cocaine based on "[t]he 174 grams of cocaine seized by the police, the testimony of the [other] burglars, and the inference to be drawn from the cash and inventory" found in petitioner's tavern, the value of which "exceed[ed] the wholesale price of a kilogram of cocaine." *Ibid.*

Judge Cudahy dissented. He found "incredible" Diaz's testimony that he had obtained cocaine from petitioner 200 times over a 30-week period and would have remanded for "another look by the able district judge." Pet. App. 5.

ARGUMENT

Petitioner renews (Pet. 12-18) his challenge to the district court's determination of his base offense level. He contends that the district court erred by relying on Diaz's testimony to determine that petitioner sold more than 500 grams of cocaine. That fact-bound contention does not merit further review.

The factual findings upon which a district court bases a sentence must be accepted on review unless they are "clearly erroneous." 18 U.S.C. 3742(e); see,

e.g., *United States* v. *Brown*, 944 F.2d 1377, 1379 (7th Cir. 1991); *United States* v. *Lira-Barraza*, 941 F.2d 745, 746 (9th Cir. 1991) (en banc); *United States* v. *Armstrong*, 901 F.2d 988, 989 (11th Cir. 1990); *United States* v. *Vopravil*, 891 F.2d 155, 157 (7th Cir. 1989). Under that standard, the court of appeals correctly upheld the district court's finding that petitioner sold more than 500 grams of cocaine in the course of his fencing operation.

The district court showed great care in determining that petitioner had sold "a minimum of 577.48 grams [of cocaine]." Gov't C.A. Br. 24 (quoting R. 112). It began with the amounts of cocaine that had been seized by the police (164.04 grams and 9.99 grams), to which it added the amounts that petitioner had supplied to the undercover officer (21.36 grams) and to Hobbs (28.34 grams). The resulting sum was 223.73 grams. Gov't C.A. Br. 23. The court then turned to Diaz's testimony that he had obtained cocaine from petitioner in exchange for cash and stolen goods on 200 occasions. The court determined that Diaz's testimony "was truthfully offered." *Id.* at 24. The court further determined that each sale to Diaz involved at least one-sixteenth of an ounce of cocaine (the same amount that petitioner had provided to the undercover officer and Hobbs). See Pet. App. 4. Based on those determinations, the court found that petitioner had supplied Diaz with at least 353.75 grams of cocaine. Gov't C.A. Br. 24. That amount, added to 223.73 grams involved in the other transactions, produced a total of 577.48 grams.

The court of appeals properly declined to disturb the district court's determination that Diaz's testimony was credible. As the court of appeals recognized, the district court was in the best position to assess Diaz's credibility. Pet. App. 4; see, *e.g.*, *United*

States v. *Harris*, 558 F.2d 366, 372 (7th Cir. 1977). Moreover, the district court's determination that petitioner had sold more than 500 grams of cocaine was buttressed by the amount of cash and stolen goods found in petitioner's possession, the value of which "exceed[ed] the wholesale price of a kilogram of cocaine." Pet. App. 4. In sum, the district court acted well within its discretion in determining petitioner's sentence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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